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IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE ADOPTION
OF MALE INFANT KONAR, NANCY SIMPSON,

Petitioner,

v.

PAUL BEELER, LINDA BEELER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF INDIANA,
FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO COURT
OF APPEALS OF INDIANA,
FIRST DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Respondents cannot accept Petitioner's statement of the Questions Presented For Review because those issues were not decided by the Court below and are not supported by the record.

The questions for review are:

1) Did the Court below decide any federal question when it held that the "consent to adoption" executed by Petitioner and filed with the Petition for Adoption had never been withdrawn?

2) Did the Court below decide any federal question when it held that a rescission of a "Voluntary Termination of Parental Rights" does not, under Indiana law, operate to withdraw a separately signed "consent to adoption" pursuant to which the child was, in fact, adopted?

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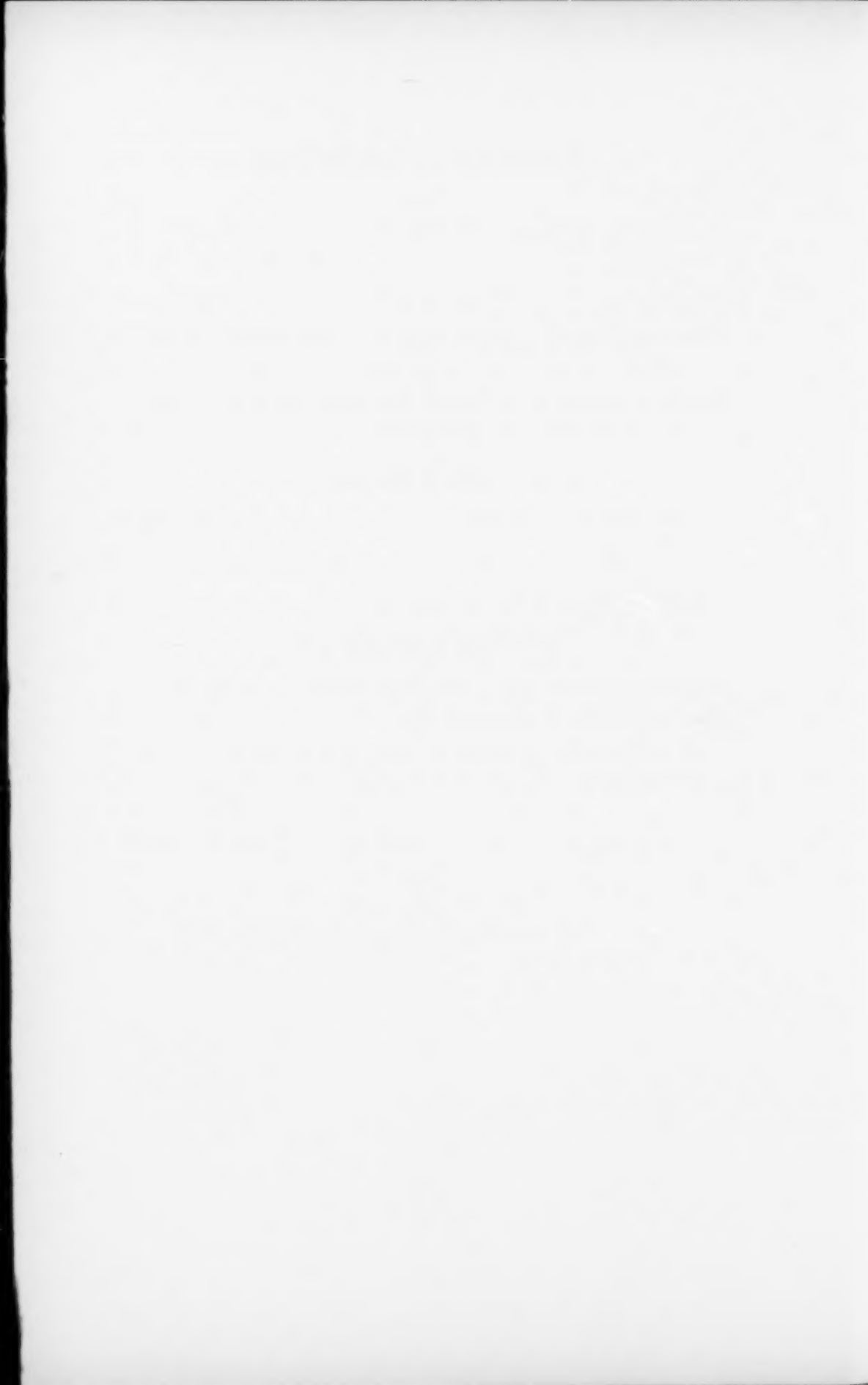
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No. 83-1902

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October Term, 1984

IN THE MATTER OF THE ADOPTION
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Petitioner,

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Respondents, Paul and Linda Beeler, respectfully
request this Court to deny the issuance of a writ of

certiorari to the Court of Appeals of Indiana, First District, thereby refusing to review the decision below.

OPINION BELOW

Respondent cannot accept the statements under Opinion Below in the Petition. Petitioner states that in an earlier opinion the Court below:

“affirmed the decision of the Washington Circuit Court of Indiana that the Petitioner had, in fact, *legally revoked her consent to adoption.*”

Petitioner has mistated the holding in that case. The case discussed in the Opinion Below is reported at 416 N.E.2d 1334 and is included as Appendix A in the Petition.

The opinion below to which the Petition is addressed is reported at 454 N.W.2d 886 and is included as Appendix B in the Petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

In addition to those set forth in the Appendix to the Petition, the following statutes are involved and are set forth in the appendix to this Brief:

1) The statute regulating consent to adoption, withdrawal of consent and notice to natural parents, compiled in Title 31, Book 1, West's Annotated Indiana Code (1979 Ed.), pages 553-555.

2) The statute regulating Voluntary Termination of Parental Rights, Title 31, Book 2, West's Annotated Indiana Code (1979 Ed.), pages 210-211.

STATEMENT OF THE CASE

Respondents cannot accept Petitioner's Statement of the Case because it contains several statements that are not supported by the facts determined from the record by the Court below. The following statements are inaccurate:

"Through these documents the issues of right to consent to the adoption and the right to receive notice of adoption proceedings were raised." (Pet. p. 4)

"In both the Petition and the Answer the issues of consent to adoption and the right to receive notice of an adoption proceeding were raised." (Pet. p. 5)

"The Court thereby reinstated Ms. Simpson's right to receive notice of adoption proceedings and the right to consent to adoption." (Pet. p. 5-6)

These three statements are not Statements of the Case. They are arguments. In the opinion below the Court determined that none of these three statements was supported by the record.

The recitation of the Facts from the opinion below present a concise and accurate statement of the case, as follows:

On April 16, 1979, Nancy Simpson (nee Konar) gave birth to an unnamed male infant. Two days later, Simpson signed a "Voluntary Termination or Relinquishment of Parental Rights" and a "Consent to Adoption". That same day, there was filed in the Washington Circuit Court a petition to make the child a ward of the Washington County Department of Public Welfare (DPW) and Simpson's waiver of notice, appearance, and consent to make the child a ward of DPW. On May 22, 1979, Simpson filed a habeas corpus complaint for the return of the child which had been placed with another family, the Beelers, appellees in this action. The DPW then filed a petition to terminate Simpson's parental rights which, in turn, prompted Simpson to file her "Notice of Rescission of Voluntary Termination or Relinquishment of Parental Rights" on June 27, 1979.

In December, 1979, the Beelers filed a "Petition for Adoption" in the Dearborn Circuit Court. The petition noted the pending action in the Washington Circuit Court. On April 23, 1980, the Washington Circuit

Court dismissed DPW's petition to terminate parental rights and granted summary judgment in favor of Simpson. The Dearborn court then granted the Beelers' petition to adopt on June 2, 1980. This court subsequently affirmed the Washington court's dismissal of the Petition to terminate parental rights. Almost sixteen months after the grant of the petition for adoption, Simpson petitioned the Dearborn court to set aside the decree granting the adoption. The court denied Simpson's petition and it is from that denial that she now appeals.

(Appendix to Petition at B)

The Court of Appeals of Indiana, in a unanimous opinion, affirmed the Dearborn Circuit Court's denial of the Petition to set aside the decree. Thereafter the Supreme Court of Indiana unanimously denied a petition for transfer, without opinion.

SUMMARY OF ARGUMENT

1) The Court below did *not* hold that an adoption proceeding without notice and *without consent* satisfies due process concerns. The question presented for review by Petitioner was not decided by the Court below. Indiana law requires notice to the natural parent, *unless a consent to adoption is filed* with the adoption petition. The Court below merely determined that a valid consent to adoption was executed by the Petitioner, the consent was filed with the adoption proceeding, and the consent was never withdrawn. Therefore, notice to the natural parent is not required. The question for review presented in the Petition was clearly not decided by the Court below. Petitioner's entire argument is predicated on the erroneous assumption that her consent had been withdrawn prior to the adoption.

2) The opinion below rests *solely* upon an interpretation of two separate state statutory schemes. The interpretation given to those Indiana statutes does not implicate any due process concerns. The Court determined that withdrawal

of a consent to adoption is governed exclusively by the provisions in the adoption statute specifically addressed to withdrawal of consent to adoption. I.C. 31-3-6-1(f). There are separate and distinct statutes governing voluntary termination of parental rights proceedings. I.C. 31-6-5-2.

A mere change of mind and notice to the court that a consent to voluntary termination of parental rights has been rescinded is sufficient to halt a voluntary termination proceeding. However, under the adoption code, a consent to adoption may only be withdrawn after petitioning the court for an order, giving notice and opportunity to be heard to the adopting parents, and establishing that the withdrawal of consent is in the best interests of the child. The court determined that a rescission of a consent to voluntary termination of parental rights does not operate to rescind a separate consent to adoption. The two concepts are two separate and distinct legal concepts governed by different standards and procedures.

3) The Petition is simply a request to have this Court redetermine a question of fact resolved by the Court below. Was the Petitioner's consent to adoption ever withdrawn? The Court determined from the record below that a valid consent to adoption was filed with the petition and it was never withdrawn. The record clearly supports that finding. As a general rule this Court will not exercise its jurisdiction to review a decision on a question of fact. This case does not come within any of the exceptions to that general rule.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DISCUSSION BELOW NOR THE COMMON LAW RECORD SUPPORT THE QUESTIONS PRESENTED IN THE PETITION FOR REVIEW

The Court of Appeals of Indiana did not hold that an

adoption proceeding *without the consent of the natural parent* and without notice satisfies due process of law.

On the contrary, the Court of Appeals of Indiana merely decided that notice was not required because there was a valid consent to adoption filed with the adoption petition. Indiana law does not allow an adoption to be obtained without notice to the natural parent unless there is either a termination of parental rights or consent.¹

The issue decided was whether the "consent to adoption" exception was properly relied upon in this case.

The Court of Appeals of Indiana determined that:

a) A valid "consent to adoption" executed by Petitioner was filed in the court hearing the adoption proceeding;

b) The "consent to adoption" had never been withdrawn;

c) Notice to a natural parent of an adoption proceeding is not required if a valid "consent to adoption" is filed in the court hearing the adoption;

d) Prior litigation between Petitioner and the Department of Public Welfare involved only a rescission of the "voluntary termination of parental rights" and the separate and distinct issue of a request to withdraw consent to adoption was not before the trial court or the Court of Appeals in that case; and

e) Since Petitioner's "due process" claims were predicated on an erroneous theory that the rescission of her consent to a voluntary termination of parental rights operated as a withdrawal of "consent to adoption" the claim was without merit.

¹ I.C. 31-3-1-6(h) provides:

(h) Notice of hearing on a petition for adoption need not be given to a person *whose consent has been filed with the petition* or whose consent is not required by subdivision (g)(3) or (g)(4) of this section. (Emphasis supplied.)

[Opinion Below, Appendix to Petition at pages B-9; B-8, 9; B-9; B-7, 8; and B-9 respectively.]

The decision below clearly did not raise or decide the due process issue presented in the Petition. The issue decided by the Court below is succinctly stated in the opinion below as follows:

“Does the natural mother’s rescission of her voluntary termination of parental rights serve to rescind a separately signed consent to adoption, pursuant to which the child was, in fact, adopted?”
[Opinion Below, Appendix to Petition at page B-4.]

In resolving the issue, the Court below based its decision solely upon Indiana’s statute regulating withdrawal of consent to adoption, I.C. 31-3-1-6(f) (A-4) and Indiana statutes regulating termination of parental rights proceedings. I.C. 31-6-5-2 (A-1).

Indiana law does not permit an adoption without notice *and without consent*, and the Court below did not so hold.

The Question for Review set forth in the Petition was clearly not decided by the Court below and is not supported by the record. Therefore the Petition should be denied.

II.

THE DECISION BELOW WAS BASED SOLELY UPON AN INTERPRETATION OF INDIANA STATUTES. THAT INTERPRETATION DID NOT IMPLICATE THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT

The Court of Appeals of Indiana held that Petitioner did not follow the statutory procedure for withdrawing her previously executed consent to adoption. The Court held that Indiana Code section 31-3-1-6(f) provides the exclusive means by which a consent to adoption may be withdrawn and that Petitioner did not follow that procedure. Ind. Code 31-3-1-6(f) states:

(f) A consent to adoption may be withdrawn after entry of the decree of adoption. A consent to adoption may not be withdrawn prior to the entry of the decree of adoption *unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.* (Emphasis supplied.)

Indiana courts, consistent with the majority of states, have long held that if consent to adoption is voluntarily executed by natural parents, such parents are bound by the consequences which the law attaches and that there is no automatic right to withdraw that consent. *Emmons v. Dinnilli* 235 Ind. 249, 133 N.E.2d 5 (1956); *Matter of Snyder*, — Ind. App. —, 418 N.E.2d 1171 (1981). See generally Annotation "Right to withdraw consent to adoption" 74 ALR 3d 421.

Thus, in Indiana, as in the majority of states, a person seeking to withdraw consent to adopt must:

- 1) Petition the Court for an order to withdraw consent;
- 2) Give notice to the adoptive parents of the petition to withdraw consent;
- 3) Provide the adoptive parents an opportunity to be heard; and
- 4) Persuade the Court that it is in the best interest of the child that consent be withdrawn.

The Court below determined that Petitioner did not even initiate these proceedings, let alone meet her burdens under the statute.

While the Indiana adoption code imposes substantial burdens on a party seeking to perfect a withdrawal of a consent to adoption, Ind. Code 31-3-1-6(f), *supra*, there are no similar constraints under the procedures governing rescission of a voluntary termination of parental rights.

Ind. Code 31-6-5-2. (A-1) As is evident from the decision in the related *Washington County* case, (Appendix to Petition at A), a mere change of mind conveyed to the Court before the voluntary termination proceedings are concluded, is a sufficient basis for dismissal of a voluntary termination proceeding.

Under Indiana law the procedures and standards regulating rescission of a consent to a voluntary termination of parental rights are not even similar to the procedures and standards governing withdrawal of consent to adoption.

The Court below examined these two statutory schemes and concluded they are not legal equivalents. The Court concluded that rescission of a voluntary termination of parental rights does not operate to rescind an otherwise valid consent to adoption. Withdrawal of consent to adoption is governed exclusively by Ind. Code 31-3-1-6(f).

The decision was based solely upon an interpretation of Indiana statutes governing voluntary termination and consent to adoption. That decision did not implicate the due process provisions of the Fourteenth Amendment.

III.

THE PETITION IS SIMPLY A REQUEST TO RELITIGATE A QUESTION OF FACT RESOLVED BY THE COURT BELOW

The Court below made specific determinations based upon the facts contained in the record presented by Petitioner. The Court found that:

- 1) There was a valid consent to adoption executed by Petitioner;
- 2) That the consent to adoption was filed with the petition for adoption;
- 3) The consent to adoption has never been withdrawn; and

4) The question of withdrawal of consent to adoption was never at issue in either of the trial courts prior to adoption, nor in the Court of Appeals' previous decision in the Washington County case.

The Court below, in determining whether Simpson's consent to adoption had been withdrawn, found:

[N]either the Washington Circuit Court nor this court considered the separately-signed consent to adoption in addressing the rescission of the parental rights termination. Therefore, we cannot agree with appellant's contention that the rescission of the voluntary termination of parental rights also operated as a rescission of the consent to adoption. *Nowhere in the proceedings is it evident that the separately-signed consent to adoption was ever even considered to be a part of the dispute.* (Emphasis added)

[Opinion Below, Appendix to Petition at B-7, 8]

Thus, the Court below found that Petitioner did not make a request that she be permitted to withdraw her consent to adoption in the Washington Circuit Court proceedings.

The Court also determined that there was no indication *anywhere* in the record below that Petitioner has ever initiated a proceeding seeking permission to withdraw her consent to adoption. Citing Indiana Code 31-3-1-6(f) (A-4), the Court below noted:

Section 6(f) provides the exclusive means by which a consent to adoption may be withdrawn prior to entry of a final decree of adoption. However, *Simpson has failed to indicate that such a procedure was involved in the instant case. Absent such an indication, we cannot say that the separately-signed consent to adoption had been rescinded.* (Emphasis added)

The lower Court's finding of fact—the valid consent to adopt was never withdrawn—is supported by the record.

As a general rule this Court will not exercise jurisdiction merely to review a decision of a state court on a question of

fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). The general rule applies even when the factual nature of the dispute is not apparent until after the petition has been granted. *Southern Power Co. v. North Carolina Public Service Co. et al* 236 U.S. 503 (1924). While the rule does not, jurisdictionally speaking, preclude review, there are very few exceptions to its application.

The Court below, based upon the facts presented in the record, has found that permission to withdraw consent to adoption was never initiated, and the consent to adoption was never withdrawn. Petitioner is now asking this Court to review that finding, determine that it is not supported by the record below, and then decide the due process issue she has posited—adoption without notice and *without consent*—the question *not* decided below.

Because the record clearly supports the lower court's finding. Respondents request this Court to apply its rule against review of decisions on questions of fact and deny the Petition.

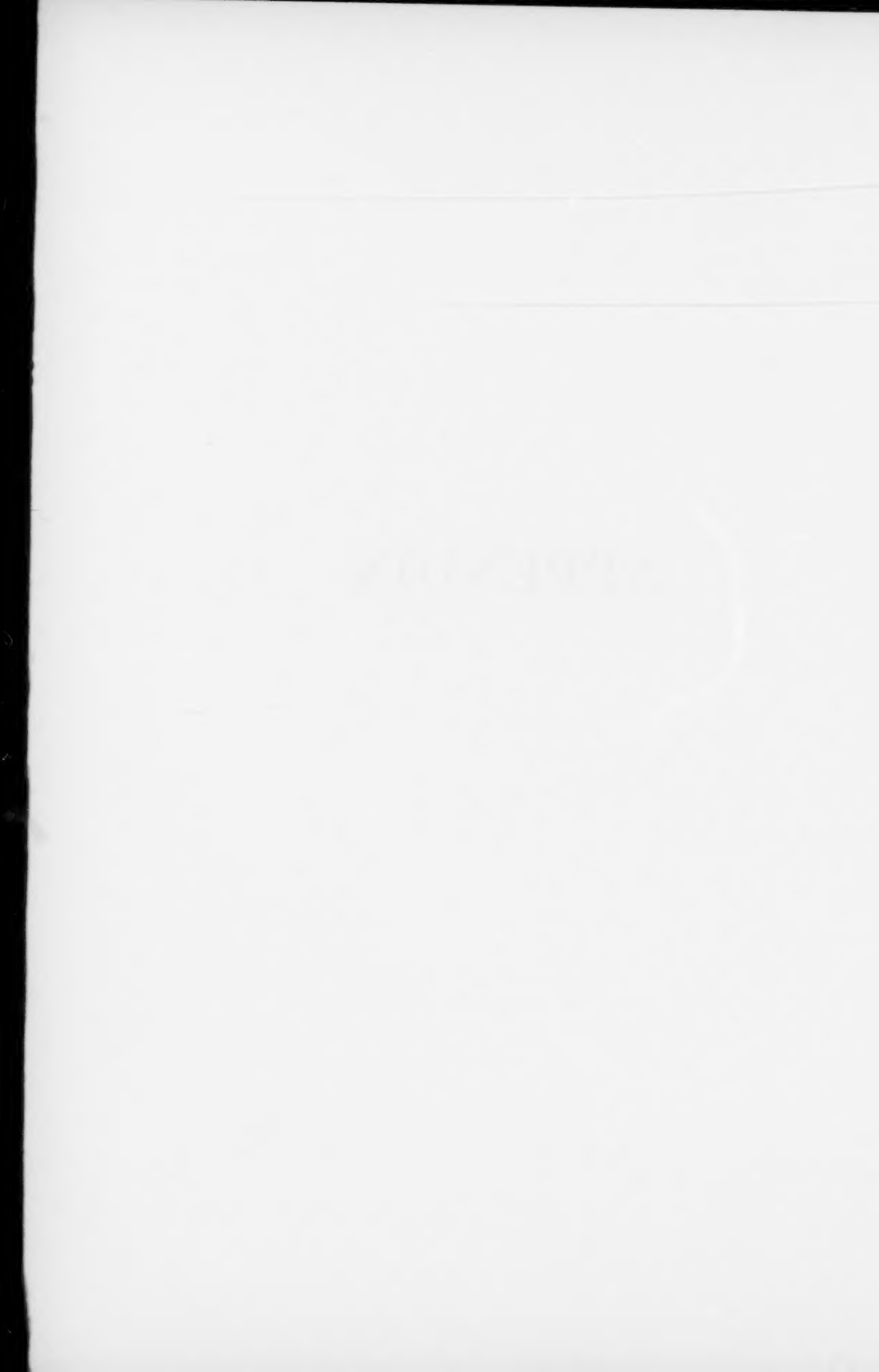
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX



31-6-5-2 Petition for voluntary termination of parental rights; notice of hearing; consent to termination; default judgment

Sec. 2. (a) The county department, or a licensed child placing agency may sign and file a verified petition with the juvenile court for the voluntary termination of the parent-child relationship if requested by the parents. The petition shall be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, his parent (or parents)" and must allege that:

- (1) the parents are the child's natural or adoptive parents;
- (2) the parents, including the alleged, or adjudicated father if the child was born out of wedlock, knowingly and voluntarily consent to the termination of the parent-child relationship;
- (3) termination is in the child's best interest; and
- (4) the petitioner has developed a satisfactory plan of care and treatment for the child.

(b) The parents shall be notified of the hearing in accord with IC 31-6-7-5.

(c) The parents must give their consent in open court unless the juvenile court makes findings of fact upon the record that:

- (1) the parents gave their consent in writing before a person authorized by law to take acknowledgements;
- (2) they were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter; and
- (3) they failed to appear.

Before the court may enter a termination order, it must inquire about the reasons for the parents' absence, and may require an investigation by a probation officer to determine

whether there is any evidence of fraud or duress and to establish that the parents were competent to give their consent. The investigation must be entered on the record under oath by the person responsible for making it. If there is any competent evidence of probative value that fraud or duress was present when the written consent was given, or that a parent was incompetent, the court shall dismiss the petition or continue the proceeding. The court may issue any appropriate order for the care of the child pending the outcome of the case.

(d) Before consent may be given in court the juvenile court must advise the parents of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter.

(e) A parent who is incompetent may give his consent to termination only with the approval of the juvenile court or of his guardian. A person under eighteen (18) years of age who is a parent may give his consent without such approval if he is competent except for his age.

(f) If the juvenile court makes findings of fact upon the record that:

- (1) one parent has made a valid consent to the termination of the parent-child relationship;
- (2) the other parent cannot be located, after a good faith effort has been made to do so;
- (3) the other parent has been served with notice of the proceedings in the most effective means under the circumstances; and
- (4) the investigation required by subsection (b) has been completed and entered on the record;

it may enter a default judgment against the unavailable parent and terminate as to both parents.

31-3-1-6 Consent; authorization; requisites, etc.

Sec. 6. (a) Except as otherwise provided in this

section, a petition to adopt a child under eighteen (18) years of age may be granted only if written consent to adoption has been executed by:

- (1) each living parent of a child born in wedlock;
- (2) the mother of a child born out of wedlock and the father of such a child whose paternity has been established by a court proceeding;
- (3) any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought;
- (4) the court having jurisdiction of the custody of the child, if the legal guardian or custodian of the person of the child is not empowered to consent to the adoption;
- (5) the child to be adopted, if more than fourteen (14) years of age; or
- (6) the spouse of the child to be adopted.

A parent under the age of eighteen (18) years may consent to an adoption without the concurrence of his parent or parents, or the guardian of his person unless the court, in its discretion, determines that it is in the best interest of the child to be adopted to require such a concurrence.

(b) The consent to adoption may be executed at any time after the birth of the child either in the presence of the court, in the presence of a notary public or other person authorized to take acknowledgments, or in the presence of a duly authorized agent of the state or county department of public welfare or licensed child-placing agency.

(c) A consent which does not name or otherwise identify the adopting parent is valid if the consent contains a statement, by the person whose consent it is, that the person consenting voluntarily executed the consent without disclosure of the name or other identification of the adopting parent.

(d) The state department of public welfare may furnish to the clerks of courts prescribed forms for use by parents or other persons when giving consent.

(e) Copies of such a consent when signed shall be filed with the investigating agency and with the clerk of the court in which the petition for adoption is pending. The court shall cause notice of hearing and opportunity to file objection to be given to parents, putative fathers, other necessary parties, and such interested parties as the court in its discretion may direct.

(f) A consent to adoption may not be withdrawn after the entry of the decree of adoption. A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.

(g) Consent to adoption is not required of:

(1) a parent or parents if the child is adjudged to have been abandoned or deserted for six (6) months or more immediately preceding the date of the filing of the petition; or a parent of a child in the custody of another person, if for a period, of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so or knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree (when the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents);

(2) the natural father of a child born out of wedlock whose paternity has not been established by a court proceeding;

(3) a parent who has relinquished his right to consent as provided in this section;

- (4) a parent after the parent-child relationship has been terminated under IC 31-6-5;
 - (5) a parent judicially declared incompetent or mentally defective if the court dispenses with the parent's consent;
 - (6) any legal guardian or lawful custodian of the person to be adopted other than a parent who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his written reasons for withholding consent, is found by the court to be unreasonably withholding his consent.
- (h) Notice of hearing on a petition for adoption need not be given to a person whose consent has been filed with the petition or to a person whose consent is not required by subdivision (g)(3) or (g)(4) of this section.
- (i) Where the parent-child relationship has been terminated under IC 31-6-5, notice of the pendency of adoption proceedings shall be given to the agency or county department of public welfare of which the child is a ward.